21-255

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~354~~. 77

THE FLORIDA RAILROAD COMPANY, PLAINTIFF IN ERROR,

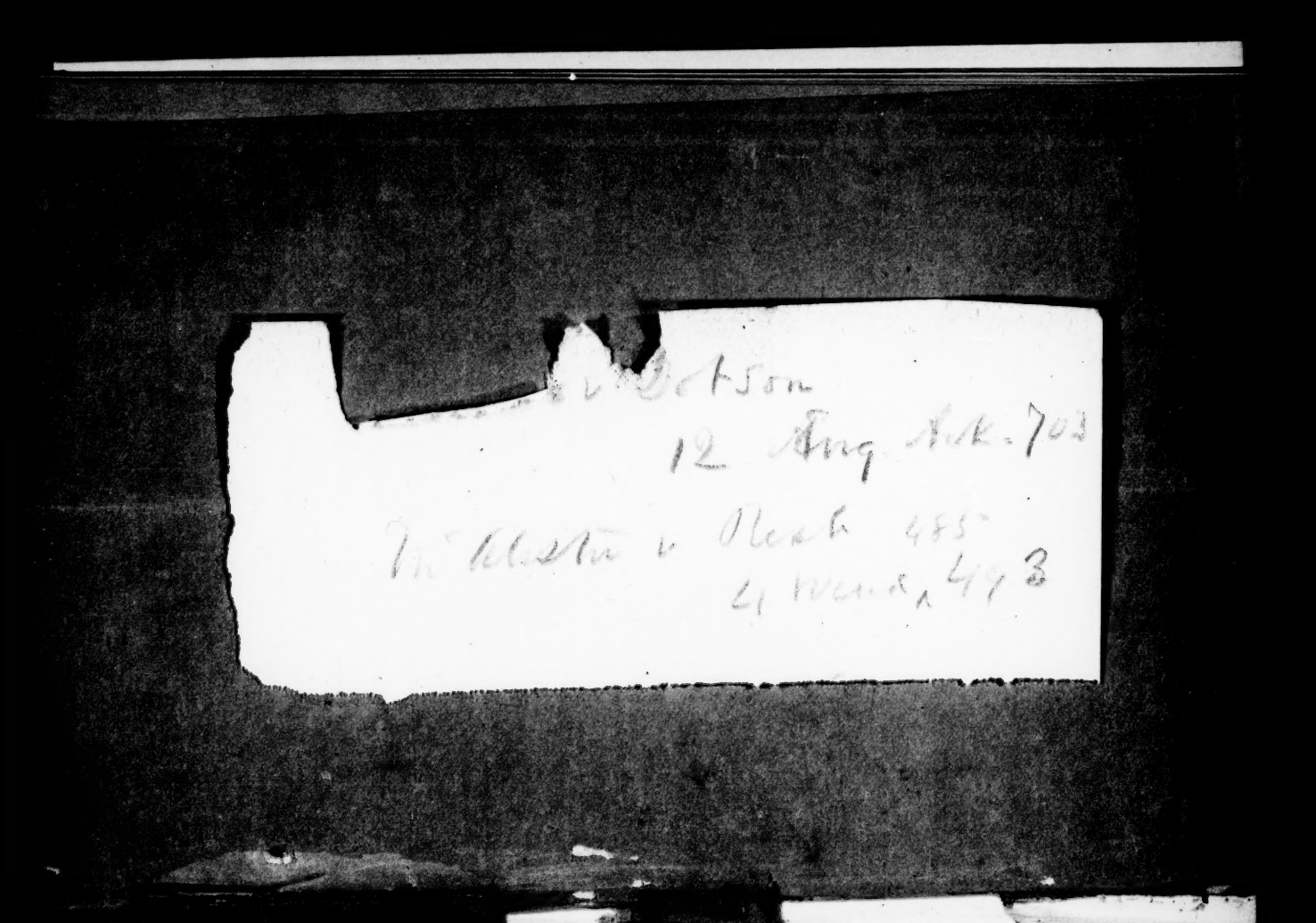
vs.

C. SHALER SMITH AND CHARLES H. LATROBE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

FILED DECEMBER 10, 1872.

Oct. D, 1874



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1 In the United States circuit court for the fifth circuit, northern district Florida, fall term, A. D. 1870.

C. SHALER SMITH & CHARLES H. LATROBE, late partners doing business under and by the firm-name and style of Smith & Latrobe,
vs.
THE FLORIDA RAILROAD COMPANY.
} Damages $8,000.00.

The clerk of the court will please issue summons ad respondendum in the above-entitled cause, returnable to the rule-day in October, and oblige,

C. P. COOPER,
Plaintiff's Attorney.

Filed 5th September, 1870.

J. E. TOWNSEND,
Clk.

2 Circuit court of the United States, 5th circuit, northern district of Florida.

The President of the United States to the marshal of the northern district of Florida, greeting:

You are commanded to summon the Florida Railroad Company, if he may be found in your district, to be and appear before the circuit court of the United States for the northern district of Florida, at the rule-day of said court, to be held at the clerk's office, in the city of Jacksonville, on the first Monday of October next, to answer unto C. Shaler Smith and Charles H. Latrobe, late partners doing business under and by the firm-name and style of Smith and Latrobe, in said court, on a plea of assumpsit, wherein the said plaintiffs claims damages to the amount of eight thousand dollars, and have you then and there this writ.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal thereof, at the city of Jacksonville, in the fifth circuit and northern district of Florida, this 5th day of September, in the year one thousand eight hundred & seventy.

[SEAL.] J. E. TOWNSEND,
3 *Clk.*

Issued 5th September, 1870. Returnable October 3rd, 1870; returned and filed 15 Sept., 1870.

J. E. TOWNSEND,
Clk.

CHAS. P. COOPER, *Attorney.*

OFFICE U. S. MARSHAL NORTHERN DISTRICT OF FLORIDA,
September 6, 1870.

Henry Hazen is hereby appointed special deputy to serve the within summons.

GEO. E. WENTWORTH,
U. S. Marshal.

Executed this eighth day of September, 1870, by serving copy upon

J. M. Hood, superintendant, at the office of the Fla. R. R. Co., the pres. and v. pres't and tre's. and directors being out of the State.

GEO. E. WENTWORTH,
U. S. Marshal,
Per HENRY HAZEN,
Special Deputy.

Marshal's costs:

Service	2 00
67 miles, 6c	4 02
	$6 02

4 In the circuit court of the United States for the fifth circuit, northern district of Florida.

C. SHALER SMITH AND CHARLES H. LATROBE, late partners doing business under and by the firm-name and style of Smith & Latrobe, *vs.* THE FLORIDA RAILROAD COMPANY. } Assumpsit. Damages $8,000.00.

NASSAU COUNTY, *to wit:*

C. Shaler Smith and Charles H. Latrobe, citizens of the State of Maryland, and late partners doing business under and by the firm-name and style of Smith and Latrobe, in the city of Baltimore, in the said State of Maryland, by Charles P. Cooper, their attorney, complains of the Florida Railroad Company, incorporated by special act of the legislature of the State of Florida, and doing business in said northern district of Florida, having their principal office or place of business in the city of Fernandina, Nassau County, State of Florida aforesaid, and being represented by Edward N. Dickinson, a citizen of the State of New York, as president, and David L. Yulee, a citizen of Florida, as vice-pres-
5 ident, and composed of stockholders citizens of both States, with the line or tracts of said Florida Railroad, the property of said company, extending and being from Fernandina aforesaid to Cedar Keys, Levy County, Florida, who have been summonsed to answer said plaintiffs in an action of assumpsit or trespass on the case. On promises, 1st. For that, whereas the defendant by Edward N. Dickinson, the president and one of the stockholders of said company, to wit, at Nassau County, in the northern district of Florida, on the twenty-first day of November, in the year of our Lord one thousand eight hundred and sixty-six, made, signed, and executed their obligation in writing, and then and there delivered the same to the plaintiffs, and thereby undertook and promised, through and by the said Edward N. Dickinson, president as aforesaid, to pay to the plaintiff the sum of four thousand three hundred and sixty dollars on or before the first day of February, one thousand eight hundred and sixty-seven, or on completion and delivery of railroad draw-bridge by plaintiffs to defendants, to be built over Amelia River, in Nassau County aforesaid, according to specifications contained in articles of agreement entered into by and between said plaintiffs and defendants, a copy of which is hereto annexed and made a part of this declaration,
6 which railroad draw-bridge was built by plaintiffs, and delivered to and received by defendants according to the term and effect of

said agreement, and has been used and control'ed by said defendants, to wit, ever since the first day of February, A. D. 1867, and is still in the possession, use, and control of said defendants; whereby defendants became indebted to the plaintiffs as aforesaid, to wit, at Nassau County, and at the time aforesaid, which period has now elapsed, whereof the defendants then and there had notice, and then and there, in consideration of the premises, promised to pay the amount of the said written obligation or agreement to the plaintiffs, according to the tenor and effect thereof. 2nd. And whereas the defendants were then and there indebted to the plaintiffs in the further sum of four hundred and eighty-nine dollars and ninety-nine cents for granite coping purchased by plaintiffs for defendants at their request, and expenses on same, laid out and paid by plaintiffs for defendants at their request. 3rd. And whereas defendants were then and there also indebted to plaintiffs in the sum of eight thousand dollars for the price and value of goods then and there bargained, sold, and delivered by plaintiffs to defendants at their request. 4th. And in eight thousand dollars for the price and
7 value of work and labor then and there done and performed, and materials for the same, provided by the plaintiffs for the defendants at their request. 5th. And in eight thousand dollars for money then and there lent by the plaintiffs to the defendants at their request. 6th. And in eight thousand dollars for money then and there paid by the plaintiffs for the use of the defendants at their request. 7th. And in eight thousand dollars money found to be due from defendants to plaintiffs upon an account stated between them. And whereas the defendants afterwards, to wit, on the first day of February, A. D. 1867, and in consideration of the premises, respectively, then and there promised to pay the said several sums of money, respectively, to the plaintiffs on request; yet, being often requested, said defendants have disregarded their promises and have not paid said moneys, or any part thereof, to the plaintiffs' damages of eight thousand dollars, and thereupon they bring suit, &c.

CHARLES P. COOPER,
Plaintiffs' Attorney.

Bill of particulars.

The Florida Railroad Company to Smith and Latrobe, D'r.

To am't for building draw-bridge	$4,560 00
" " " granite-coping and expenses	489 99

8

To am't for price and value of goods	$8,000 00
" " " work and materials	8,000 00
" " " money lent	8,000 00
" " " am't paid for defendants	8,000 00
" " " due from defendants to pl'ff on account stated between them	8,000 00
" " of interest	

Declaration filed Sept. 5, 1870.

J. E. TOWNSEND, *Clk.*

C. P. COOPER, *Plff's Att'y.*

In United States circuit court, 5th circuit, for northern district of Florida.

THE FLORIDA RAILROAD COMPANY
vs.
SMITH AND LATROBE. } Assumpsit.

And the said defendants, by its attorneys, Baker and Dewson, comes and defends the wrong and injury when, &c., and says that the said plaintiffs did not erect and build the draw-bridge across the Amelia River in manner and form as in their first count alleged, in accordance with the said contract or agreement, made with the said plaintiffs
9 by said Edward N. Dickinson, on behalf of Florida Railroad Company, on the plans and tracings therein agreed upon; that the said draw-bridge was built by plaintiffs in an imperfect, unskilful, and unworkmanlike manner, and was unfit for the uses and purposes for which the same was built; that, for the purpose of remedying the defects in said work upon said draw-bridge, and cause the same to be of use and work satisfactorily, the defendants were compel'ed to lay out and expend large sums of money for labor and material to prepare said draw-bridge to admit ships or vessels to pass, to wit, the sum of eight hundred and ninety-five dollars; and that the defendant has, by reason of the non-performance of said contract by the plaintiffs, sustained further damage on account of the detention of a certain vessel belonging to S. L. Barnes & Co., named Flora Temple, at said draw-bridge, to wit, the sum of four hundred and eighty dollars, and that they have been otherwise greatly damaged, and this the defendant is ready to verify; wherefore judgement is prayed, &c.

And for a further plea in this behalf, defendant says that on the second day of November, 1867, and at other days and times, it paid to the said plaintiffs the sum of fourteen hundred and ninety-seven dollars and sixty cents on account, and in discharge of said claim under said
10 contract with plaintiffs, which said sums of money so paid has not been credited on the account of said plaintiff, or allowed to said defendant; and this the defendant is ready to verify, and prays judgment.

And for a further plea in this behalf, the defendant says that the plaintiff ought not further to have and maintain his said action against it; because it says that the said plaintiff at and before the commencement of this suit is indebted to the defendant, to wit: at the county and State aforesaid, in the sum of nine hundred and twenty-eight dollars, for money paid and advanced by the defendant to the plaintiff on request; and in four hundred ninety-six dollars for work and material furnished by the defendant, and money paid out by the non-performance of the said plaintiffs of the said contract, as alleged in the first count of their declaration, to complete the imperfect and unskilful work of plaintiff on said draw-bridge, and to render the same fit for use and for opening; and in the sum of four hundred and eighty dollars for damages sustained by defendants, and money paid out on account of detention by vessel at said bridge, caused by the unskilful and imperfect manner of building said draw-bridge by plaintiff, in violation of
11 said agreement; and in sum of three thousand dollars for other damages sustained by defendant on account of various hindrences, delays, and losses of time, caused by the said plaintiffs in their failure to comply with the terms of said agreement in the building of said bridge; which said sums of money, so due and owing to the defendant as aforesaid, exceed the damages sustained by the plaintiffs by reason of

the non-performance by the defendant of the said supposed promises and undertakings in said first count of plaintiffs' declaration mentioned; and out of said sums of money so due and owing from the said plaintiff to the defendant, the defendant is ready and willing, and hereby offers to set off and allow to the said plaintiff the amount of these damages, according to law in such cases. And this defendant is ready to verify; whereupon defendant prays judgment, &c.

And the said defendant, for a further plea in this behalf, says that the defendant did not undertake and promise in manner and form as the plaintiff in his second, third, fourth, fifth, sixth, and seventh counts hereinabove complained against it; and of this the defendant prays may be inquired of by the country, &c.

DEWSON & BAKER,
Attorneys for Def't.

12 Personally came before me the undersigned, J. M. Hood, superintendant Florida Railroad Company, who, being duly sworn, says that the matter and things contained in the foregoing pleas are true in substance and in fact.

J. M. HOOD.

Sworn to and subscribed before me this 4th of November, A. D. 1870.

CHA'S W. LEWIS,
U. S. Commissioner for Northern District of Florida.

Pleas filed Nov. 7, 1870.

J. E. TOWNSEND, *Clk.*

DEWSEN & BAKER, *Att'ys for Def't.*

Replication.

In the circuit court of the United States for the fifth circuit, northern district of Florida.

C. SHALER SMITH & CHARES H. LATROBE, late partners doing business under and by the firm-name and style of Smith & Latrobe,
vs.
THE FLORIDA RAILROAD COMPANY.

Assumpsit. Damages $8,000.00.

NASSAU COUNTY, *to wit:*

13 And the said plaintiff, as to the said first plea of the defendants by them pleaded, saith that the said plaintiff by reason of anything by the said defendants in that plea alleged ought to be barred from having and maintaining his aforesaid action thereof against the said defendants, because he saith that the said draw-bridge was built by the plaintiffs according to contract, and defendants accepted and took possession of said draw-bridge, and have used and controlled the same as set forth in plaintiffs' declaration, and are therefore estop'ed from pleading the matters and things therein pleaded and set forth in their first plea, even if the same were true, which plaintiffs deny, except plaintiffs' admissions therein contained of using and control'ing said drawbridge. And this plaintiffs are ready to verify; wherefore they pray judgment, &c. 2d. And as to defendants' pleas, which concludes with a verification, plaintiffs join issue, and prays the same may be in-

quired of by the country, &c. 3d. And the said defendants' pleas, whereof they have put themselves upon the country, plaintiffs do the like.

C. P. COOPER,
Pl'ffs' Att'y.

As to plaintiffs' first replication to defendants' pleas, defendants join issue thereon.

JAMES M. BAKER,
H. BISBEE, JR.,
Def'ts' Att'ys.

April 18, 1872.
Filed Sep't 29, 1871.

J. E. TOWNSEND,
Clk.

14 United States circuit court.

THURSDAY MORNING, *April 18th*, 1872.

The court met pursuant to adjournment. Present, the honorable Philip Fraser, judge.

The court was opened in due form by the crier, when the court proceeded to business.

SMITH AND LATROBE,
vs.
THE FLORIDA RAILROAD COMPANY. } Assumpsit. Issue joined.

This cause came on to be heard this day. Whereupon came a jury to try the issue joined, to wit:

1. ROY P. MOODY,
2. ALEXANDER DAVIDSON,
3. WILLIAM W. MOORE,
4. JASON M. FAIRBANKS,
5. MICHAEL BOWES,
6. THOMAS N. MCCORMICK,
7. JOSEPH A. BARBER,
8. CHARLES H. COOLER,
9. DAVID HALL,
10. WILLIAM GROTHER,
11. WILLIAM CAULK,
12. ROBERT HOUSTON,

who were duly sworn to try the issue joined. The hearing of testimony in this cause continued to the hour of adjournment. Whereupon it is ordered that this court stand adjourned to 10 o'clock to-morrow morning.

15 FRIDAY MORNING, *April* 19, 1872.

The court met pursuant to adjournment.

Present, the honorable Philip Fraser, judge.

The court was opened in due form by the crier, when the court proceeded to business.

SMITH & LATROBE
vs.
THE FLORIDA RAILROAD COMPANY. } Assumpsit.

This cause came on again to be heard this day. The jury empaneled in the cause, being called, answered as follows, to wit:

1. ROY P. MOODY,
2. ALEXANDER DAVIDSON,
3. WILLIAM W. MOORE,
4. JASON M. FAIRBANKS,
5. MICHAEL BOWES,
6. THOMAS N. MCCORMICK,
7. JOSEPH A. BARBER,
8. CHARLES H. COOLER,
9. DAVID HALL,
10. WILLIAM GROTHER,
11. WILLIAM CAULK,
12. ROBERT HOUSTON.

The hearing of testimony continued to the hour of adjournment. Whereupon it is ordered that this court stand adjourned to 10 o'clock to-morrow morning.

SATURDAY MORNING, *April* 20, 1872.

The court met pursuant to adjournment.
Present, the honorable Philip Fraser, judge.
The court was opened in due form by the crier, when the court proceeded to business.

16 SMITH & LATROBE
vs.
THE FLORIDA RAILROAD COMPANY. } Assumpsit.

This cause came on again to be heard this day. The jury empaneled in the cause, being called, answered as follows, to wit:

1. ROY P. MOODY,
2. ALEXANDER DAVIDSON,
3. WILLIAM W. MOORE,
4. JASON M. FAIRBANKS,
5. MICHAEL BOWES,
6. THOMAS N. MCCORMICK,
7. JOSEPH A. BARBER,
8. CHARLES H. COOLER,
9. DAVID HALL,
10. WILLIAM GROTHER,
11. WILLIAM CAULK,
12. ROBERT HOUSTON.

The testimony in this cause continued to the hour of adjournment, and was closed. Therefore, ordered that this court stand adjourned to 10 o'clock *to* Monday morning.

MONDAY MORNING, *April* 22*nd*, 1872.

The court met pursuant to adjournment.
Present, the honorable Philip Fraser, judge.
The court was opened in due form by the crier, when the court proceeded to business.

SMITH & LATROBE
vs.
THE FLORIDA RAILROAD COMPANY. } Assumpsit.

17 This cause came on again to be heard this day. The jury empaneled in the cause, being called, answered as follows, to wit:

1. ROY P. MOODY,
2. ALEXANDER DAVIDSON,
3. WILLIAM W. MOORE,
4. JASON M. FAIRBANKS,
5. MICHAEL BOWES,
6. THOMAS N. MCCORMICK,
7. JOSEPH A. BARBER,
8. CHARLES H. COOLER,
9. DAVID HALL,
10. WILLIAM GROTHER,
11. WILLIAM CAULK,
12. ROBERT HOUSTON.

At the opening of the court the argument of counsel for defence begun and continued to the hour of adjournment. Whereupon it is ordered that this court stand adjourned to 10 o'clock to-morrow morning.

TUESDAY MORNING, *April* 23, 1872.

The court met pursuant to adjournment.
Present, the honorable Philip Fraser, judge.

The court was opened in due form by the crier, when the court proceeded to business.

SMITH & LATROBE
vs.
THE FLORIDA RAILROAD COMPANY. } Assumpsit.

This cause came on again to be heard this day. The jury empaneled in this case, being called, answered as follows, to wit:

1. ROY P. MOODY,
2. ALEXANDER DAVIDSON,
3. WILLIAM W. MOORE,
4. JASON M. FAIRBANKS,
5. MICHAEL BOWES,
6. THOMAS N. MCCORMICK,
7. JOSEPH A. BARBER,
8. CHARLES H. COOLER,
9. DAVID HALL,
10. WILLIAM GROTHER,
11. WILLIAM CAULK,
12. ROBERT HOUSTON.

The argument of counsel in this cause was resumed upon the opening of the court, and continued to the hour of adjournment. Whereupon it is ordered that this court stand adjourned to 10 o'clock to-morrow *morrow* morning.

WEDNESDAY MORNING, *April 24th*, 1872.

The court met pursuant to adjournment. Present the honorable Philip Fraser, judge.

The court was opened in due form by the crier, when the court proceeded to business.

SMITH AND LATROBE
vs.
FLORIDA RAILROAD COMPANY. } Assumpsit.

This cause came on again to be heard this day. The jury empaneled in the cause, being called, answered as follows, to wit:

1. ROY P. MOODY,
2. ALEXANDER DAVIDSON,
3. WILLIAM W. MOORE,
4. JASON M. FAIRBANKS,
5. MICHAEL BOWES,
6. THOMAS N. MCCORMICK,
7. JOSEPH A. BARBER,
8. CHARLES H. COOLER,
9. DAVID HALL,
10. WILLIAM GROTHER,
11. WILLIAM CAULK,
12. ROBERT HOUSTON.

19 The argument of counsel for plaintiffs in this cause continued to the hour of adjournment, and concluded. Whereupon it is ordered that this court stand adjourned to 10 o'clock to-morrow morning.

THURSDAY MORNING, *April 25th*, 1872.

The court met pursuant to adjournment. Present, the honorable Philip Fraser, judge.

The court was opened in due form by the crier, when the court proceeded to business.

SMITH & LATROBE
vs.
THE FLORIDA RAILROAD COMPANY. } Assumpsit.

This cause came on again to be heard this day. The jury empaneled in the case, being called, answered as follows, to wit:

1. ROY P. MOODY,
2. ALEXANDER DAVIDSON,
3. WILLIAM W. MOORE,
4. JASON M. FAIRBANKS,
5. MICHAEL BOWES,
6. THOMAS N. MCCORMICK,
7. JOSEPH A. BARBER,
8. CHARLES H. COOLER,
9. DAVID HALL,
10. WILLIAM GROTHER,
11. WILLIAM CAULK,
12. ROBERT HOUSTON.

The argument of counsel for plaintiffs in this cause being concluded yesterday, the court, on its opening, proceeded to charge the jury, when the case was submitted.

The jury, after mature consideration, returned the following
20 verdict:

"We, the jury, do find for *for* the plaintiffs, and assess the damages at four thousand and fourteen dollars and ninety-five cents.

MICHAEL BOWES,
For'man.

21 *Defendants' first bill of exceptions.*

THE FLORIDA RAILROAD COMPANY, PLAINTIFFS IN ERROR,
vs.
SMITH & LATROBE, DEFENDANTS.

At the trial of this cause the plaintiff', to support the issue joined on their part, read in evidence articles of agreement, as follows:

Between Smith and Latrobe, civil engineers and bridge-builders, Baltimore, Md., and the Florida Railroad Company, the above-mentioned Smith and Latrobe agree to build a swinging draw-bridge at the Amelia River crossing of said R. R. of (65) sixty-five feet in length and 56 feet clear opening, in strict accordance with the plan and tracings already submitted, the bridge proper to be of the Frink suspension pattern, and all iron except the c'ords; the bridge to be strained to but one-fifth (1) of its ultimate strength by a distributed load of one tun per line' foot, or a concentration of 80,000 lbs. on any 12 feet of its length; the bridge to be handed over to the R. Rd. Co., ready for the spiking down of the nails, on or before the first of February, 1867. In consideration of the above, Edward N. Dickinson, on behalf of the Florida Railroad Company, agrees to pay to Smith and Latrobe $4,360.00, four thousand three hundred and sixty dollars cash, upon the completion of the work in accordance with the specifications, dated Nov. 21st, 1866.

SMITH & LATROBE.
EDWARD N. DICKINSON.

22 The plaintiffs then read in evidence the depositions of Charles H. Latrobe, one of plaintiffs, to show that the contract was finally carried out in good faith by the plaintiffs in the summer of 1867, and bridge taken into immediate possession by the railroad company for the passage of trains; that the turning arrangements were found to be defective on account of the manner in which the crab was attached to the

bridge, and that there was considerable difficulty in working it; that the railroad company had laid the granite coping so badly and unevenly that the traverse-circle while resting on the granite on one side had to be raised above the granite on the other side about one inch, and was sustained by a bed of sulphur, which was a hinderance to the proper setting of the traverse-circle; that in March, 1868, the witness, Charles H. Latrobe, upon complaint being made by the said company of the defects in the draw-bridge on account of the turning arrangements still giving trouble, came to Florida and made certain improvements by placing a new wrought-iron table under the draw, which caused it to revolve with so much ease that he could push it off without any effort; that defendants did some shop-work on turn-table for plaintiffs, worth about seventy-five dollars; that he was unable to fix the crab at that time, but
23 afterwards had it repaired by Mr. Stone; that owing to the cog segments being out of line by the settlement of traverse-circle, the bevel-wheel again broke; that they tried to get the Florida Railroad Company to put the crab in order themselves, but they refused; that plaintiffs finally employed T. E. Buckman to put the running-gear in order, which he did in September, 1869, so that one man readily opened and closed the draw with the crab. Plaintiff' never heard any further cause of complaint about the bridge; that they, the plaintiffs, purchased for the accommodation of the Florida Railroad Company, at the request of E. N. Dickinson, president, in the spring of 1869, the granite coping for the draw-bridge; it was furnished in Baltimore after their drawings, and was carefully framed together before shipment and loaded on the same vessel with the iron-work purchased by plaintiffs for the bridge, and forwarded together to Florida; that a complete drawing of the bridge was submitted, examined, and approved by Mr. Dickinson at the time of the signing of the contract, and that he was aware of the character of the structure; and that the bridge was built in accordance with said plan; that the plaintiff then introduced the evidence of T. E. Buckman to show that he was employed as an engineer by the plaintiffs, in the fall of 1869, for repairing and correcting defects in the Ameliadraw-bridge; that he found the crab arrangements and the traverse-circle
24 out of order; that he had the *the* defects removed so far as was in his power; that the primary cause of the derangement was the want of level of the masonary-work and granite coping built by the Florida Railroad Company; that he had to insert iron wedges between the granite coping and turn-table, in places, to remedy the defects; that before he left the work he tested the working of the turning arrangements, and that a boy of 16 years of age could easily open and shut the draw. He proved letter of John W. Craig, road-master of the Florida Railroad, pronouncing the work satisfactory; letter read in evidence; also proved that it was the duty of the road-master to see to keeping in repair the bridges, &c., on the road; that witness was referred to Craig by Major Noice, acting superintendent and general freight agent and master of transportation of the Florida Railroad, Mr. Yulee being absent at the time. Witness sent said letter to plaintiffs, and never heard any further complaint of the working of the bridge.

Plaintiffs, , on cross-inter'ogatories, and answers to same by R. M. Meader, defendant's witness, who testified that the railroad company commenced to run the cars and use the bridge as soon as it was completed, and kept a watchman in charge of the bridge up to the time witness left, in the summer of 1869, and that the bridge was built with ordinary skill, and
25 that the difficulty was in the plan, which plan he also says was

agreed upon between the plaintiffs and Mr. Dickinson, president of the road. The plaintiffs sent the material for bridge to Fernandina before the foundation was built by defendants, but when the plaintiffs ar'ived to commence work on the bridge the pier was completed, except the putting on the granite coping, and while the granite coping was being put on the plaintiffs' workman were engaged on the wood-work of the bridge, after which the work went on with reasonable dispatch to completion. Courter testified that the masonary-work on the pier was completed a few days before plaintiffs' workmen ar'ived to commence work on the bridge, and that the granite coping was laid after they ar'ived. Letters of plaintiffs, introduced as evidence by defendants, showing that, while they admitted the difficulty of turning the bridge with ease at a time subsequent to the completion, they attribute it to the want of level of the track or foundation, and to the green masonory-work of foundation built by defendants, and to the setting of same. They insist, however, that the bridge worked ordinarily well afterwards: (see letter A, marked exhibits.) The latter clause of one of said letters having been introduced, but the entire letter read to the jury by defendants' counsel, the whole letter was subsequently ruled in by the
26 court, and commented on by counsel. The demand of payment by plaintiffs was proved by D. S. Yulee, and by one of said letters as testimoney introduced by defendants, on all of which plaintiffs relied and insisted.

On the further trial of the cause the defendants, to maintain the issue on their part joined, introduced evidence to show that the draw-bridge built by the plaintiffs across the Amelia River was improperly constructed; that the draw was defective, and worked with difficulty; that the plaintiffs were frequently notified of these defects by letter, introduced in evidence; that plaintiffs admitted that the arrangements were imperfectly constructed, and made efforts from time to time until September, 1869, to remedy the defects; that the plaintiffs did not so far complete the bridge as to enable cars to cross until some time in the summer of 1867; that their material for building the bridge did not ar'ive in Fernandina until March 23d, 1867; that the bridge was used by the company for passage of their cars on railroad as soon as they were enabled to do so, but proved by D. S. Yulee that the bridge was never received formi'ly by the company in accordance with the contract; that the floor-beams and stringers placed by plaintiffs in said bridge proper were constructed of wood, instead of iron as stipulated in contract; that the iron floor-beams and stringers
27 would have cost three thousand dollars, while if constructed of wood they would have cost from three to five hundred dollars; that plaintiffs made the drawing for the granite coping for bridge-pier, and procured it at Baltimore and forwarded the coping in same vessel with the other material they sent out for the building the bridge; presented their bill of eight hundred dollars for the same, which was promptly paid; that the coping was placed on the pier by Courter, who built it under the supervision of Grant, the plaintiffs' engineer, who superintended the building of the bridge to this extent, directing the edge of the coping to extend over the edge of the pier, which was offered as a sug'estion from Grant. Courter, who built the pier, testified that it was level. Cooper, an engineer sent out by plaintiffs in the fall of 1867, to remedy defects in the bridge, admit'ed, as testified to by D. S. Yulee, that the pier was level. Moody, an employee of plaintiffs under Buckman, testified that he applied an instrument to the pier in September, 1869, and found it level. Meader deposes

that during his connection with the road *that* the pier had not settled. Depositions of R. D. Meader further shows that he acted as engineer for the Florida Railroad during the building of the bridge, and until the summer of 1869; that the construction of the bridge was such that it did not fulfil the conditions of an ordinary railroad draw-bridge, on account of the difficulty in opening and
28 closing it; that it was not in good working order at any time during his connection with the railroad; that the defects in the turning arrangements were communicated to the plaintiffs very soon after the bridge was built, and that complaints continued to be made to them from time to time until he left the road in summer 1869. The counsel for the plaintiffs to the admis'ion of the answers of said witness to inter'ogatories 8, 9, 10, 11, the objection having been endorsed on the inte'ogatories as follows: plaintiffs' counsel excepts to the witness, R. D. Meader, answering defendants' direct inter'ogatories 8, 9, 10, 11, on the ground that said inter'ogatories 8, 9, 10, 11 relate to speculative damages, which, if proven, would not be a proper set-off, and inter'ogatory 11 seeks to elicit testimony on a point or matter not in the contract, and hence not in issue between the parties. Signed C. P. Cooper, for plaintiff.

8th inter'ogatory. State whether the structure and arrangements of said bridge caused any injury or damage, hinderance or delay, to the defendants in the run'ing of the railroad on the same; and if so, state particularly what.

9th interrogatory. State whether or not any hinderance or delay was caused by the imperfect construction of said bridge to any vessel,
29 steamboat, or craft in the navigation of said river over which said bridge was built; and if so, what.

Inter'ogatory 10. State whether or not the imperfect structure or working of said bridge caused danger of its injury or distruction by vessels navigating said river; if so, the reason of such damage.

Interrogatory 11th. State the number of hands required to work said draw-bridge, and how many would be necessary if properly constructed.

The court sustained the objection of plaintiffs' counsel, and ruled out said inter'ogatorys and the answers thereto, on the ground that they were not admiseble. The counsel for defendants then and there excepted to the ruling of the court.

Defendant's 2nd bill of exception.

Defendants further introduced the evidence of D. S. Yulee, showing that Mr. Craig, whose letter was introduced by plaintiffs, was not as road-master authorized to bind said company, as their agent, by any admissions in relation to said draw-bridge contract or any other contract; that the same did not come within the scope of his authority or duty; that the difficulties and defects in said draw-bridge have only been temporarily relieved, but never have been removed and still exist. Defendants for further evidence in said cause introduced a drawing or sketch of said draw-bridge, which was presented by the plaintiffs when the contract was made between the parties, which was proven by
30 D. L. Yulee to be the same to in the said contract. It was further shown by experts that no drawing or tracings of the or turning arrangements,-or of the floor-beams or stringers, appeared on said plan of bridge produced in evidence. The defendant then offered to prove by experts that the plan of the machinery, and the

DISCREPANCY IN PAGINATION

Or

PAGES MISSING

And

CANNOT BE FOUND

DISCREPANCY IN PAGINATION

Or

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And

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count is not evidence against him, being *prima-facie* evidence against him, and may be disproved by other evidence. If the credit side of the account only is evidence, what does it prove; what indebtedness of the defendant does it show payments? It shows payments of
35 cash to Grant, who was the agent of plaintiffs in building the bridge, to amount of one thousand and twenty-five dollars. It also shows in labour by the defendants—in labor to the amount of seventy-four dollars and eighty cents, and in shop-work on new turn-table, amount not stated. The evidence hows that the new turn-table was put in in 1868, by the plaintiff, Latrobe, himself superintending the work; and Latrobe says in his evidence that the shop-work would not exceed in valne the sum of seventy-five dollars. By introducing this part of the account only, the defendant admits a subsisting debt due to the plaintiffs upon which payments have been made; and fair inference would be that the payments were made upon the contract price of building the bridge. By making payments upon the contract price, he admits that the contract price is due and payable; and as the contract price was due and payable only upon the completion of the work, in accordance with the specifications, the fair inference from such payments is, that the work was completed. But this account having been given in evidence by the defendants, the jury must take the whole of it together into consideration; it forms one entire admission and cannot be seperated. The first item which is made evidence is a charge for contract price,
$4,360.00. This is the same amount as the price named in the
36 contract for building the bridge, and it is not denied that the charge is for that work. It appears from the account that the payments were applicable to that charge. The defendants, by giving the account in evidence, makes it his own admissions as well as that of the plaintiffs, and must abide the full legal effect of it, which is, that the contract price due and payable, together with its corol'ory, to wit, that the contract has been performed, and the plaintiffs are therefore entitled to recover the contract price. The account also amounts to an account stated between the parties, and may be recovered upon under the count upon an account stated. To which instructions the counsel for the defendants then and there excepted.

Defendants' 9th bill of exceptions.

The court further charged the jury in another part of his charge: That if the jury found from the evidence that the amount of the item for shop-work on turn-table has been proved, they will add such sum to the balance, cast the interest upon the balance from the commencement of the suit so struck, and the amount will be the sum for which the plaintiffs will be entitled to a verdict. To which charge the defendants' counsel then and there excepted. And defendants pray the court to sign and seal the for'going exceptions taken at the trial of said cause, and order the same to be enrol'ed and made a part of the record; all of which is accordingly done.

PHILIP FRASER, [SEAL.]
Judge.

37 *Letters read in evidence.*

BALTIMORE, *September* 7, 1867.

We forgot to mention that we have sent an engineer to Fl'a to report

on the same point, and to state what is the matter with the draw. Prompt attention will oblige,

Very respectfully, yours,

SMITH & LATROBE.

EDWARD N. DICKINSON.
Pres. Fl'a R. R'd Co.

Letter dated Sept'r 7, 1867. The latter portion, begin'g at the words "We forgot to mention," read in evidence and filed this 20th April, 1872.

FARMSVILLE, OHIO, *Dec.* 31, '67.

R. D. MEADER, Esq'r.,
Fernandina, Fl'a:

D'R SIR: I am gratified at having succeeded in opening a correspondence with you upon the subject of the Amelia draw. We have, as you know, spent some money and time to render our work satisfactory, and it is my intention to visit this bridge next month and devise some method for making it more perfect than it seems to be. In the first place, are you sure of your foundation; is the pier immovable? This is, of course, all important. If this is the case, then, of course, the fault
38 is in the turn-table. I am aware that the covered wheel is the proper wheel for heavy weights, and in all large draws we use these connected with the pier directly; but in small bridges, like yours, covering is not resorted to generally, and hundreds of times bridges exist straight wheels. There is one in Missourie which travels on two, 150 feet long, with square faces. You do not state whether any parts have shown signs of failure, or whether the clamps reached you. On my a'rival at Fernandena I shall be pleased to talk on the bridge with you. I should like to hear from you again on the subject, and answering the above quistions.

Yours, truly,

C. H. LATROBE,
P'r SMITH & LATROBE.

Offered in evidence and ruled out; ruling excepted to. Filed April 20th, 1872.

BALTIMORE, *Aug. 24th*, 1868.

D. S. YULEE, Esq'r:
Fernandina, Fl'a:

SIR: We have ordered sent to you the necessary bridled gearing for the draw-bridge. Will you have it put on at once, and the cogged ends set aright? An answer requested.

39 Very respectfully,

SMITH, LATROBE & CO.
C. H. LATROBE.

Read in evidence and filed April 19, 1872.

OFFICE OF THE FLORIDA RAILROAD CO.,
Fernandina, Sept. 15, 1868.

Messrs. SMITH, LATROBE & CO.:

DEAR SIRS: Your letter of Aug. 24th I found awaiting me here on my return from N. York. I had written to you before leaving N. Y'rk, in reply to your previous communication. In reply to this letter of 24th Aug'st, to which you specially request an answer, I beg to say that since the view presented by you in your former letter, to which

I recently replied, I am not willing to assume for the company any responsibility in regard to the construction of the bridge, and therefore cannot undertake for the company to have the work done which you desire. I am quite willing to facilitate your completion of the contract, and allowing Mr. Meader as your agent to use the necessary time to do what you request to be done, and to allow also such workmen and shop-service to be employed in the perform' as may be required. This position is not induced by any unkindness of disposition, but is in consequence of what I regarded the unjust tenor of your former letter.

Yours, respectfully,

D. L. YULEE.

40 Since writing the above, I learn from Mr. Meader that he had complied with your wishes, and that the wheel broke again upon first trial, (as he had apprehended it would,) owing to insufficient strength in its plan. He has advised you to-day by letter of the fact.

Offered in evidence and ruled out; ruling excepted to. Filed April 19, 1872.

BALTIMORE, *September* 22, 1868.

D. L. YULEE, Esq.,
Fernandina, Fl'a:

D'R SIR: Yours of 15th to hand, also Meader's communicating the misfortune of another break. We will this time, I hope, compass the difficulty by sending a sett strong enough. I again repeat that we have no desire to put any responsibility in regard to the successful working of the gear on the Fl'a R. R. Co., but simply to obtain the good offices of their engineers as to insert it, thus saving the travel and expense of another trip to so distant location.

Very respectfully, yours,

C. H. LATROBE.
SMITH, LATROBE & CO.

Will ship the gear as soon as ready.
Read in evidence and filed April 19, 1872.

41 FARMSVILLE, OHIO, *June* 6, 1868.

D. L. YULEE, Esq.,
Fernandina, Fl'a:

DEAR SIR: Yours of Dec. 20 has been sent me here. I am coming to Fernandina as soon as I finish here, and will see the draw righted properly. It never was properly erected, and has not had a half a chance. The covering of the wheels is not considered necessary in so small a draw. From a want of level in the track when first put up, binding in the pin and being opened by main force in this condition, it is more than probable that the whole work is sprung and the wheels all awry. The excellence of the workmanship is shown by its not having given way. However, I shall rectify it this month, I hope, and make the crab work yet.

Yours, truly,

C. H. LATROBE.

Read in evidence and filed April 19, 1872.

42 *Charge of the court.*

SMITH & LATROBE
vs.
THE FLORIDA RAILROAD COMPANY. } Assumpsit.

Gentlemen of the jury: This is an action of assumpsit brought by the plaintiffs to recover the contract price for building a draw-bridge for the defendants across the Amelia River, on the line of the defendants' road. The contract bears date the 21st day of November, A. D. 1866, and by its terms the plaintiff' agrees to build and complete the bridge ready for delivery on the first day of February, A. D. 1867. The bridge is to be built of certain dimensions, is to be a swinging draw-bridge, after the Fink pattern, and to be built in conformity to the plan which has been given in evidence, and which is referred to in the contract; and the bridge propper is to be built all of iron except the chords, which are to be of wood. The defendants agree to pay to the plaintiffs, on the completion of the contract, the sum of four thousand three hundred and sixty dollars. It has been conceeded by both parties that the pier upon which the bridge was to rest was to be built by the defendants, though the contract is silent upon that subject, and is shown by the evidence that the pier was built by the defendants, but
43 was not ready to receive the granite coping until some time in the latter part of March, A. D. 1867, nearly two months after the time when the bridge was to have been finished according to the terms of the contract. Now it is contended by the defendants that the plaintiffs contracted to finish the bridge by the first day of February, 1867; that the time was a material part of the contract, and that having failed to complete it before the first day of July following, they failed to comply with their undertaking in this respect, and was therefore entitled to recover nothing. It is a well-settled rule of law, say the Supreme Court in Desmotts *vs.* Jones, 2 Wallace, 7, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good unless its performance is rendered impossible by the act of God, the law, or the other party. If the other party, by any act of his part, prevent the performance of the contract within the time, he cannot insist upon the time when called upon to pay the contract price for the work, if afterwards finished with his knowledge and consent. If the jury find from the evidence that it became impos'ible for the plaintiffs to perform their contract on the first day of February, 1867, in consequence of the failure of defendant' to build the pier upon which the bridge was to rest as its foundation, and that it was the duty of the defendant' to build
44 said pier, and not of the plaintiffs, and that the defendant' went on to build the bridge with the consent of the defendants, then the time is not essential and the plaintiffs are entitled to recover if the contract has been performed in other respects. If both parties have departed from the special agreement by consent as to time, then the time ceases to be essential, and such consent may be implied by the acts of the parties as well as expressed in words, as where one party encourages another to go on with his work after the expiration of the time agreed upon, or accepts the work after it is finished and takes the benefit of it without objection. But where there is no hindrance of the work on the part of the defendant, and no consent, expressed or implied, that the time shall be waived or departed from, then the plaintiffs must be held to a strict compliance with the terms of their contract. But the defend-

ants cannot set up any deviation from the contract induced by himself. When the plaintiff has been guilty of fraud, or has wilfully abandoned the work, leaving it unfinished, he cannot recover in any form of action. Fraud is the intentional and successful employment of any cunning deception or artifice used to circumvent, cheat, or deceive another. In order to fix fraud upon the plaintiffs in the execution of their work, the jury must find, from the evidence, that they have misled, deceived, and
45 cheated the defendants by some artifice, mis-*mis*-representation, or deceit. For instance, if the plaintiffs knew of any latent defect in the material of which the bridge was built, causing such material to be unfit for the purpose for which it was used, and yet used it, concealing the defects from the defendant, it would be a fraud; but the use or substitution of wood for iron in some part of the structure which is patent and apparent to the notice of the casual observer, and in the construction of which either wood or iron may be used according to the agreement of the parties, is not a fraud, although it may be a departure from and a breach of the contract. Wilfully means obstinately, with design and set purpose. A wilful abandonment of the work would be fraud by evidence that the plaintiffs *that the plaintiffs* obstinately refused to finish it. If there be no such evidence there was then no wilful abandonment of the work. If the jury find from the evidence that the plaintiffs, when called upon by the defendants to do so, expended considerable labor and material to make the work complete, and never refused to remedy any defect pointed out by the defendant', then they did not wilfully abandon the work. It is also evidence tending to prove the good faith of the plaintiffs in their performance. When the plaintiffs have in good faith fulfilled, but not in the manner or not, within the time pre'cribed by the contract, and the
46 other party has sanctioned or accepted the work, he may recover upon the common counts in indebitatus assumpsit. Good faith means with probity, without fraud, with an honest intention to perform. Therefore, if the jury find from the evidence that the plaintiffs have done the work in good faith but not in the manner or at the time prescribed by the contract, and that the defendant has sanctioned and accepted it, then they will be entitled to recover the contract price under the counts in indebitatus assumpsit. If the jury find from the evidence that on or about the first day of July, A. D. 1867, the defendant took the bridge into possession, occupied and used the same, and then, or soon afterwards, paid to the plaintiff a part of the contract price for the work, without any objection as to the manner of the performance, such facts are evidence of a sanction and acceptance of the work. There is nothing in the contract directly binding the plaintiffs to furnish the material for the bridge. It is left to inference, from the words "all of iron but the chords." This omission has been supplied by evidence that the plaintiffs did furnish the iron-work and shipped it to Fernandena, that is, all the iron-work but the floor-beams and stringers, and if these do not appear upon the plan and tracings, a strict construction of the contract
47 does not require that they should not furnish them. But if the jury shall find from the evidence that the plaintiffs did agree to furnish the iron for the floor-beams and stringers, and that they substituted wood for the iron, and that the defendants made no objection to the bridge on this account, but took into possession and used it for nearly five years before making any complaint on that ground, and then not until after suit brought for the recovery of the contract-price and the trial had commenced, the presumption is, that the wood was substituted by consent of the defendants, or that it never was intended by the parties that the plaintiffs should furnish the iron for those parts of the bridge.

It is incredible that the defendant should never have insisted on the plaintiffs performing their contract in this respect, when the iron was of so much greater value than wood, if they were bound to do so, and when they were so clamorous for performance in other respects. The floor-beams and stringer were plainly visible; it was apparent to any one who examined the bridge that they were of wood; yet there is not the slightest evidence that the defendants have made any objection to them until since the commencement of this trial. I think the objection comes too late. The long silence of the defendants on this point
48 is evidence of acquiescence in the performance of the plaintiffs in this respect. The defendant is not, therefore, entitled to recover or set off the difference between the price of wood and iron in this case. Although the contract does not provide in words for the manner of the work or the quality of the material, yet it implies that the work shall be done with ordinary skill, and of a fair quality of material; not the highest degree of skill or the very best material, but such as shall make a job fit for the purpose for which it was intended by the parties. If the jury find from the evidence that the difficulty in turning the bridge was from the defects in the pier and not in the bridge, then the fault would be in the defendants, whose duty it was to put the pier in proper order to receive the bridge. But it is argued that Grant, the agent of the plaintiffs for the building of the bridge, superintended and directed the laying of the granite coping of the pier, and that, therefore, if it was defectively done, the plaintiffs were responsible. That might be true if it were shown that Grant in so doing was acting within the scope of his authority as agents for the plaintiffs. But unless the jury find from the evidence that Grant was authorized by the plaintiffs to finish the pier as well as to build the bridge, any direction of his to the *to the* builder of the pier cannot prejudice or effect the rights of the plaintiffs or bind them in any degree. There is no
49 evidence that he had any authority from the plaintiffs to do anything but to build the bridge. If, again, the defects in the bridge were inherent in the plan agreed upon between the parties, and it was built in accordance with the plan, and was as to workmanship and materials sufficiently well built according to the rule hereinbefore laid down, then the plaintiffs are not responsible for any defect in the working of the bridge. If there were any defects in the turning-gear, not caused by the defects of the pier or the plan of the bridge, and the plaintiffs remedied such defects at their own expense, and the defendants still continued to use the bridge without further objection, the plaintiffs have fulfilled their contract in such a manner as to entitle them to recover the contract-price, deducting therefrom the payments made upon the same, with interest at the rate of six per cent. per annum from the commencement of this suit upon the balance. The defendant has introduced in evidence an account stated between the plaintiffs and defendants, or purporting to be such, and has proved the same to be in the handwriting of the plaintiff, Latrobe. The counsel for defendant' read all the items, debit and credit, to the jury. It is contended by the defendant' counsel that this account was introduced simply to prove payments made by the defendant to the plaintiff and credited to the defendants in the account, being the admissions of the plaintiffs
50 in this respect, but that the debit side of the account is not evidence against him, only prima facie at most, and may be disproved by other evidence. If the credit side of the account is evidence, what does it prove? Upon what indebtedness of the defendant' does it show payments? It shows payment of cash to Grant, who was the agent of

the plaintiffs in building the bridge, to the amount of one thousand and twenty-five dollars. It also shows payment in labor by the defendant to the amount of seventy-four dollars and eighty cents, and in shop-work on new turn-table, amount not stated. The evidence shows that the new turn-table was put in in 1868 by the plaintiffs, Latrobe himself superintending the work. And Latrobe says, in his evidence, that the shop-work would not exceed in value the sum of seventy-five dollars. By introducing this part of the account only, the defendant' admits a subsisting debt due to the plaintiffs upon which payments have been made, and a fair inference would be that these payments were made upon the contract-price for building the bridge. By making payments upon the contract-price, he admits that the contract-price is due and payable, and as the contract price was due and payable only upon the completion of the work in accordance with the specifications, the fair inference from such payments is, that the work was completed.

51 But this account having been given in evidence by the defendant, the jury must take the whole of it together into consideration; it forms one entire admission and cannot be seperated. The first item which is made evidence is a charge for contract-price, $4,360. This is the same amount as the price named in the contract for building the bridge, and it is not denied that the charge is for that work. It appears from the account that the payments were applicable to that charge. The defendant', by giving the account in evidence, make it his own admissions as well as that of the plaintiffs, and must abide the full legal effect of it, which is, that the contract is due and payable, together with its corol'ory, to wit, that the contract has been performed and that the plaintiffs are therefore entitled to recover the contract-price. The account also amounts to an account stated between the parties, and may be recovered upon under the amount upon an account stated *account stated.* If the jury find from the evidence that the amount of the item for shop-work on new turn-table has been proved, they will add such sum to the credit side of the account, strike the balance, cast their interest upon the balance from the commencement of suit so struck, and the amount will be the sum for which the plaintiffs will be entitled to a verdict.

Filed April 25, 1872.

52 United States circuit court. April adjourned term. April 25th, 1872.

C. SHALER SMITH & CHARLES H. LATROBE, late partners, doing business under and by the firm-name and style of Smith and Latrobe, } Assumpsit.
vs.
THE FLORIDA RAILROAD COMPANY.

And now on this, the 25th day of April, in the year of our Lord one thousand eight hundred and seventy-two, comes the plaintiffs, by their attorney, Charles P. Cooper, and it appearing to the court that due and legal service of the summons in this cause had been duly made, and that the declaration had been duly filed; and it further appearing to the court that pleas had been duly filed and issue joined, whereupon came a jury to try the issue and assess the damages to wit: Roy P. Moody, Alexander Davidson, William W. Moore, Jason M. Fairbanks, Michael Bowes, Thomas N. McCormick, Joseph A. Barber, Charles H. Cooler; David Hall, William Grother, William Caulk, and Robert Houston,

who were duly sworn to assess the damages, and who, upon their
53 oath, do say: "We, the jury, do find for the plaintiffs and assess the damages at four thousand one hundred and eighteen dollars and ninety-five cents."

Now, therefore, it is considered and ordered by the court that the plaintiffs do have and recover of and from the defendant the aforesaid sum of four thousand one hundred and eighteen dollars and ninety-five cents, with interest thereon from the twenty-fourth day of April, A. D. one thousand eight hundred and seventy-two, at the rate of eight per cent. per annum until paid, for the damages assessed aforesaid by the jury aforesaid in the manner and form aforesaid, by reason of the non-performance of certain promises and undertakings of the said defendant thus lately made to the plaintiffs aforesaid, as set forth in their declaration on file herein; and also the sum of one hundred and eleven dollars and twenty-seven cents for their costs and charges by them about this suit in that behalf expended and now here adjudged to them.

54 UNITED STATES OF AMERICA:

The President of the United States to the judges of the circuit court of the United States for the northern district of Florida.

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between C. Shaler Smith and Charles H. Latrobe, late partners doing business under and by the firm-name and style of Smith and Latrobe, and The Florida Railroad Company, a manifest error hath happened to the great damage of the said The Florida Railroad Company as by complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

55 Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and Josiah E. Townsend, clerk of the said circuit court of the United States for the northern district of Florida, at the city of Jacksonville, in said district, this sixth day of May, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

[SEAL.] JOSIAH E. TOWNSEND,
Clerk of the Circuit Court of the United States
Northern District of Florida.

56 (Indorsed:) In the United States circuit court northern district of Fl'a. The Florida Railroad Company, plaintiffs in error, vs. Smith & Latrobe, defendants in error. Original writ of error. Filed May 6, 1872. J. E. Townsend, cl'k.

57 UNITED STATES OF AMERICA, *ss:*

To C. Shaler Smith and Charles H. Latrobe, partners, using the name of Smith and Latrobe, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Florida, wherein The Florida Railroad Company is plaintiffs, and you are defendants in error, to show cause, if any there be, why judgment in the writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Philip Fraser, judge of the district court of the United States for the northern district of Florida, presiding as the judge of the 5th judicial circuit, in & for said district, this the sixth day of May, in the year of our Lord one thousand eight hundred and seventy-two.

PHILIP FRASER,
Judge.

Served the within citation this day by delivering a true copy to Charles P. Cooper, attorney for defendants in error, this the sixth day of May, A. D. 1872.

G. CONANT,
U. S. Marshal.
Per THOMAS McMURRAY,
Dep'ty.

58 Sworn to and subscribed before me this 6th day of May, A. D. 1872.

J. E. TOWNSEND,
Clk.

Filed May 6, 1872.

J. E. TOWNSEND,
Clk.

In circuit court of the United States for 5th judicial circuit and northern district of Florida.

Know all men by these presents that we, The Florida Railroad Company, David L. Yulee, Sam'l A. Swann, and John Darby, are held and firmly bound unto C. Shaler Smith and Chas. H. Latrobe, partners using the name and style of Smith and Latrobe, in the sum of eight thousand two hundred and thirty-seven $\frac{90}{100}$ dollars, to be paid to the said Smith and Latrobe, their executors, administrators, or assigns. To which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our successors, or heirs, executors, administrators, firmly by these presents. Sealed with our seals and dated the 25th day of April, 1872.

The condition of this obligation is such that whereas the said Smith and Latrobe has recovered a judgment in the circuit court of the United States, in the fifth judicial circuit for the northern district
59 of Florida, against the said Florida Railroad Company, for the sum of four thousand one hundred and eighteen $\frac{95}{100}$ dollars, which said judgment was rendered on the 25th day of April, eighteen

hundred and seventy-two. And whereas the said Florida Railroad Company, in order to obtain a reversal of the same, hath sued out a writ of error to the Supreme Court of the United States:

Now, therefore, if the above-named Florida Railroad Company shall prosecute its said writ of error to effect, and shall answer all damages and costs, and pay the said judgment, if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

The Florida Railroad Company

By D. L. YULEE,
V. P. & Act'g Pres'd't.

D. L. YULEE. [SEAL.]
SAM'L. A. SWANN. [SEAL.]
JOHN DARBY. [SEAL.]

Executed and delivered in presence of—
Attest: JOHN HEDGES, *Sec'y.*
Witness: CHARLES W. LEWIS.

U. S. DISTRICT COURT,
Northern District of Florida:

Before me, Charles W. Lewis, a commissioner for the United States in and for said district, this day personally came David L. Yulee and Sam'l A. Swann, to me known to be the same persons who
60 signed and executed the for'going bond and acknowledged the execution thereof to be their free act and deed for the uses and purposes therein expressed, and the said David L. Yulee, and the said Sam'l A. Swann, each being duly sworn deposes and said, each for himself, the said David L. Yulee, that he is worth the sum of eight thousand five hundred dollars, and the said Sam'l L. Swann the sum of four thousand five hundred dollars, over and above all legal exemptions and liabilities.

D. L. YULEE.
SAM'L A. SWANN.

Acknowledged and sworn to before me this 29th day of April, A. D. 1872.

CHAS. W. LEWIS,
U. S. Commissioner for Northern District of Florida.

COUNTY OF DUVAL,
State of Florida:

Personally appeared before me, this third day of May, A. D. 1872, John Darby, to me well known, and acknowledged that he signed the for'going bond for the purposes therein mentioned, and being duly sworn says that he is worth eight thousand and five hundred dollars over and above all just debts and liabilities.

JOHN DARBY.

Sworn to and subscribed before me the day and year above written.

C. L. ROBINSON,
U. S. Commissioner.

Approved May 6, 1872.

PHILIP FRASER,
Judge.

61 In the United States circuit court, 5th circuit and northern district of Florida.

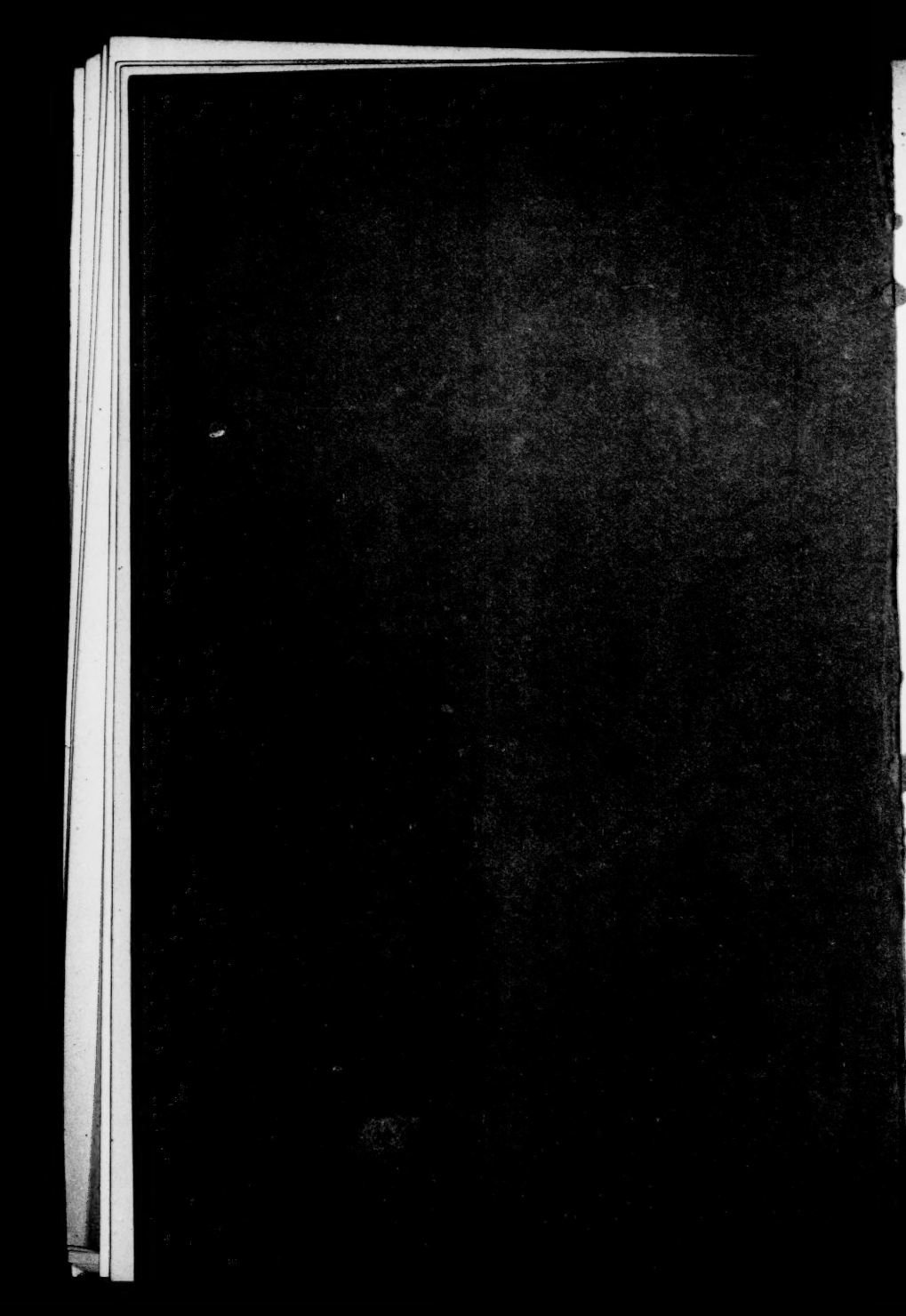
I, J. E. Townsend, clerk of the United States circuit court, 5th circuit and northern district of Florida, certify that the within and foregoing writing contains a true and faithful copy of the original record and proceedings in the cause therein mentioned and set forth as of record and on file in this office.

Given under my hand and the seal of the said court, at the city of Jacksonville in said district, this twenty-fifth day of September, A. D. one thousand eight hundred and seventy-two.

[SEAL.] J. E. TOWNSEND,
Clerk.

(Indorsement on cover:) No. 354. The Florida Railroad Company, plaintiff in error, vs. C. Shaler Smith and Charles H. Latrobe. N. Florida, C. C. U. S. Filed 10th December, 1872.

REC. 354—3



THE FLORIDA RAIL ROAD COMPANY

IN ACCOUNT WITH SMITH & LATROBE.

DR.

To contract price	$4,360.00	
" Freight and wharfage on granite coping	399.99	
" Use of crane and labor	30.00	
" Insurance on same	60.00	
" Bumettized timber, drayages	1.00	$4,849.99

CR.

	By cash to Grant	$300.00
	" " " "	650.00
	" Labor by Company	56.80
Nov. 10.	" Cash to Grant	75.00
	" Labor, 12 days by Co.	18.00
	" Shop-work on new turntable	

Date to above cash payment can be supplied from books.

IN THE CIRCUIT COURT OF THE UNITED STATES,
NORTHERN DISTRICT OF FLORIDA.

I, J. E. Townsend, Clerk of the Circuit Court of the United States for the Northern District of Florida, certify that the foregoing is a true copy of the original account offered and read in evidence upon the trial of the case of Smith and Latrobe against the Florida Rail Road Company in the United States Circuit Court for the Northern District of Florida at the December Term of said Court, A. D. 1872.

(U. S. Circuit Court, Northern Dist. Fla.)

Given under my hand and the seal of the said Circuit Court, at the City of Jacksonville, in said District, this 7th day of September, A. D. one thousand eight hundred and seventy-four.

J. E. TOWNSEND,
Clerk U. S. Circuit Court, Northern Dist. Fla

We hereby consent that the above certified copy of account, referred to in bill of exceptions, and omitted in appendix, may be filed and considered as part of the record in said cause.

JAMES M. BAKER,
Attorney for Plaintiff in Error.

C. P. COOPER,
Defendants' Attorney.

OCTOBER 8, 1874.

W. W. Douglass, Job Printer, Baltimore

17 L. y. 15

Supreme Court of the U. S.

THE FLORIDA RAILROAD COMPANY,
Plaintiff in Error,

vs.

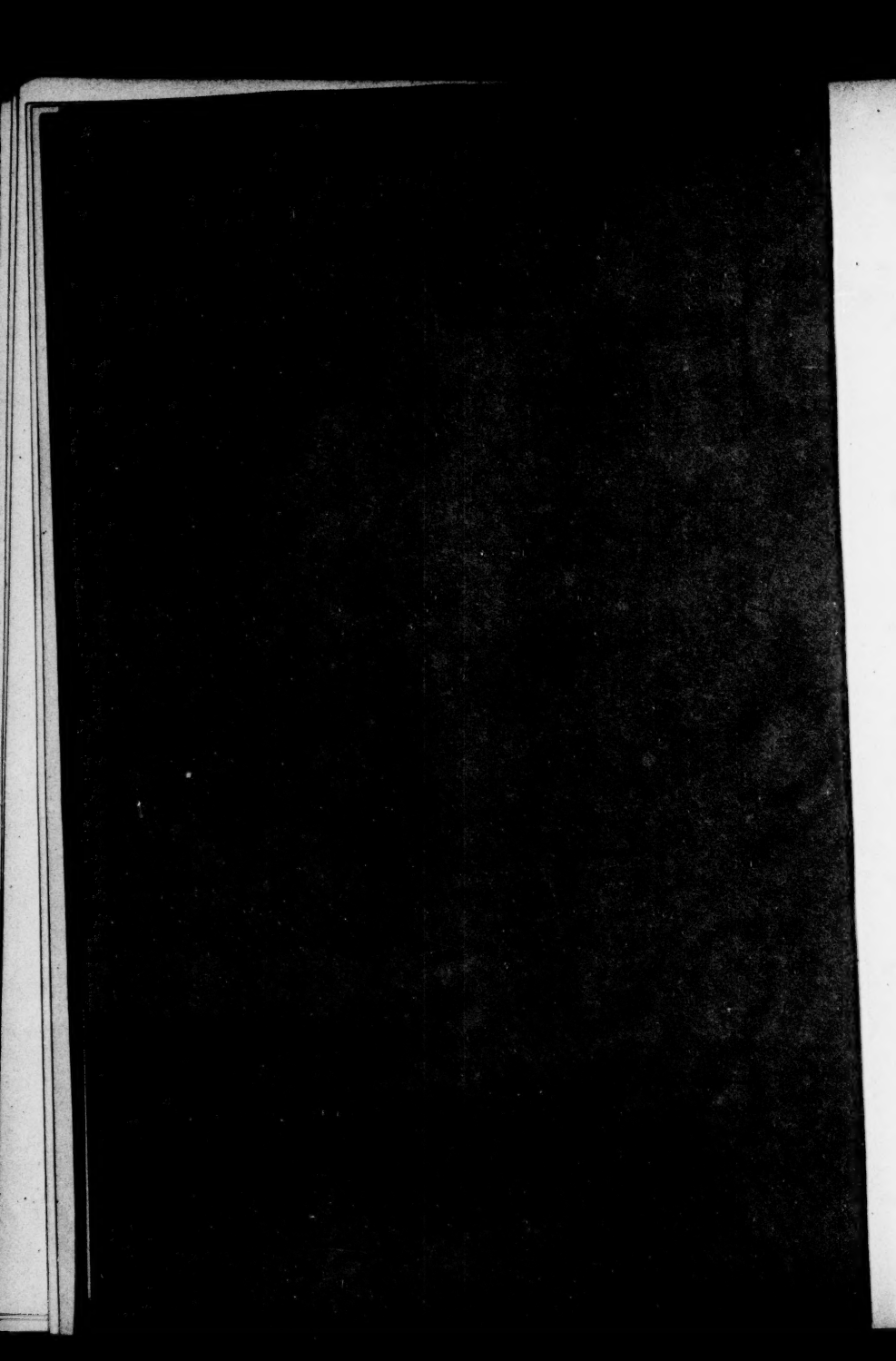
C. SHALER SMITH AND CHARLES H. LATROBE,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Florida.

BRIEF OF PLAINTIFF IN ERROR.

WM. M. MERRICK,
For Plaintiff in Error.

Murphy & Co., Printers & Stationers, 182 Baltimore street, Baltimore.



Supreme Court of the United States.

THE FLORIDA RAILROAD COMPANY, *Plaintiff in Error*,

vs.

C. SHALER SMITH AND CHARLES H. LATROBE,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Florida.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action of assumpsit brought by defendants in error to recover the contract price of an iron bridge built under a special contract accompanied by plans and specifications.

The defences relied upon were part payment, recoupment on account of unskilful and insufficient work, defective construction, and damages sustained by defendant arising directly out of delays and defects in construction of the bridge, and on the other hand the plaintiffs below contended that whatever imperfections existed in the bridge were due to defects in the prepar-

ation of the foundation for the bridge which had been prepared and built by the defendant. There was testimony taken on both sides, written as well as oral, all of which is embodied in the exceptions numbered 1 and 2 on pages 9 to 13 inclusive of the Record. The verdict and judgment being for the plaintiffs below, the present writ of error has been sued out to correct certain erroneous rulings upon questions of evidence and in the charge of the judge tot he jury which are particularly set out in the following

ASSIGNMENT OF ERRORS.

1ST ERROR. The plaintiff in error to maintain his claim for recoupment offered to read from the deposition of R. D. Meader the Engineer of the road, interrogatories numbered 8, 9, 10, 11 and the answers thereto, but the Court refused to permit the interrogatories and answers thereto to be offered in evidence on the ground that they related to speculative damages and matters not in issue and the plaintiff in error excepted, which several interrogatories are as follows, (p. 12:)

8th Interrogatory. State whether the structure and arrangements of said bridge caused any injury or damage, hindrance or delay to the defendant, in running of the rail road on the same, and if so, state particularly what?

9th Interrogatory. State whether or not any hindrance or delay was caused by the imperfect construction of said bridge to any vessel, steamboat or craft in the navigation of said river over which said bridge was built, and if so, what?

10th Interrogatory. State whether or not the imperfect structure or working of said bridge caused danger of its injury or destruction by vessels navigating said river, if so, the reason of such damage?

[redacted] portion of the charge of the judge to the jury embraced by the sixth exception (p. 14) and (p. 19 of charge in full,) which is as follows: "There is nothing in the contract directly binding the plaintiffs to furnish material for

tiffs to furnish the pier as well as build the bridge, any direction of his to the builder of the pier cannot affect or prejudice the rights of the plaintiffs or bind them in any degree. There is no evidence that he had any authority from the plaintiffs to do

anything but build the bridge. Whereas the judge ought to have charged in substance that if the plaintiffs had knowledge through their agent of the condition of the pier and proceeded to erect the bridge upon it without objection, they were bound so to erect it as to make it reasonably sufficient for the purposes designed according to the plan thereof.

5TH ERROR. This error consists in that part of the judge's charge which is embraced in the eighth exception (p. 14, and judge's charge p. 20,) as follows: "The defendant has introduced in evidence an account stated between the plaintiffs and defendant, or purporting to be such, and has proved the same to be in the handwriting of the plaintiff Latrobe. The counsel for the defendant read all the items, debits and credits to the jury. It is contended by the defendant's counsel that this account was introduced simply to prove payments made by the defendant to the plaintiffs and credited to the defendant in the account, being the admission of the plaintiffs in this respect, but that the debit side of the account is not evidence against him, only *prima facia* at most, and may be disproved by other evidence. If the credit side of the account only is evidence, what does it prove? Upon what indebtedness of the defendant does it shew payments? It shews payments of cash to Grant, who was the agent of the plaintiffs in building the bridge, to the amount of one thousand and twenty-five dollars. It also shews payment in labor by the defendant to the amount of seventy-four dollars and eighty cents, and in shop work on new turn table, amount not stated. The evidence shews that the new turn table was put in in 1868 by the plaintiffs, Latrobe himself superintending the work, and Latrobe says in his evidence that the shop work would not exceed in value the sum of seventy-five dollars. By introducing this part of the account only the defendant admits a subsisting debt due to the plaintiffs, upon which payments have been made; and fair inference would be that the payments were made upon

the contract price of building the bridge. By making payments upon the contract price he admits that the contract price is due and payable; and as the contract price was due and payable only upon the completion of the work, in accordance with the specifications, the fair inference from such payments is that the work was completed. But this account having been given in evidence by the defendant, the jury must take the whole of it together into consideration, it forms one entire admission and cannot be separated. The first item which is made evidence is a charge for contract price, $4,360. This is the same amount as the price named in the contract for building the bridge, and it is not denied that the charge is for that work. It appears from the account that the payments were applicable to that charge. The defendant, by giving the account in evidence, makes it his own admission as well as that of the plaintiffs, and must abide the full legal effect of it, which is that the contract price is due and payable, together with its corollary, to wit: that the contract has been performed, and the plaintiffs are therefore entitled to recover the contract price. The account also amounts to an account stated between the parties, and may be recovered upon under the count upon an account stated." Whereas the judge below ought to have charged in substance that while the account was evidence against the plaintiff, any portion of it was open to rebuttal by him, and ought further to have charged that although it might be evidence against him as to the mere state of the account in regard to debit and credit, it did not debar the defendant below from establishing the independent matter of recoupment or set-off by the proper evidence offered for that purpose.

6TH ERROR. The plaintiff in error having offered in evidence a statement of accounts made out by plaintiffs, containing debits and credits, to prove certain credits, then offered evidence to impeach

one of the debits. On objection by plaintiffs the Court excluded the evidence in impeachment and decided that the defendant was estopped from contradicting any part of the account, (see fourth exception, p. 13.) In this ruling there was error.

POINTS AND AUTHORITIES.

Upon the foregoing assignments of error the plaintiff in error will contend:

First. That the questions and answers specified in the first assignment of error ought to have gone to the jury as well because they were direct proof of the nature and character of the defects in the construction of the bridge as because they tended to furnish to the jury elements for a correct measure of damages in recoupment, under the rule which allows all such damages as are incidental to and caused by the breach of contract, and which naturally and reasonably flow from it and are not merely accidental, or contingent, or speculative. The 8th interrogatory and answer directly pointed to hindrance and obstruction in operating the road for the uses of which the bridge was built, and taken in connection with the 11th interrogatory and answer, pointed to immediate and direct expense incurred by plaintiff in error in obviating the imperfections of the work. In like manner the 9th and 10th tended to show in what the imperfections consisted, the bridge being on a navigable stream and requiring a draw for the use of vessels, and rendering the plaintiff in error directly responsible for damages as for a nuisance to navigation. And the rule of damages in recoupment as sanctioned by Cilley vs. Tenny, 31 Vermont, 401, and Abbott vs. Gatch, 13 Maryland, 334; Jones vs. Dermott, 2 Wallace, p. 7; 18 Vermont, 620; 2 Parson's Contracts, 458, et seq., fully support the offer of testimony as made in the Court below.

2d Point. The ruling of the Court below in rejecting the evidence set out in the second bill of exceptions and specified in the second foregoing specification of errors was erroneous for the same reasons which are advanced in our first point upon the 8th and 11th interrogatory, and further because said offered evidence was in no manner directed to any question upon the construction of the terms of the contract, but only to those points upon which the contract was silent, and to the specific elements which make a proper measure of damages in recoupment. For example, an offer "to prove by experts that the quality of material of the bridge, both wood and iron, was very bad and put together in an unworkmanlike manner" has nothing to do with "the construction of the contract as a question of law." A reference to authorities in support of this assignment is deemed unnecessary.

3d Point. The plaintiff in error will maintain that the portion of the judge's charge embraced in the third assignment of error is obnoxious to the objection that a just construction of the contract between the parties (see it at large on p. 9) does, contrary to his ruling, shew that the materials were all to be furnished by defendants in error, and also to the further objection that if the plaintiff in error objected generally to paying for the work, as the whole record shews, his omission to point out specific objections can under no circumstances be taken as a waiver of those objections, nor can the use under protest of a structure erected on one's own land, and which he is forced to occupy and use with all its defects, be taken as a waiver of objections or furnish any presumption, still less a conclusive one, that he has consented to the substitution of inferior and cheap, for good durable and more costly material. The case might be different with a moveable chattel which a party has an option and a faculty of accepting or rejecting the possession of in toto.

4th Point. The plaintiff in error will contend that the fourth assignment of error is well taken to the portion of the Court's charge there specified, because whatever may have been the defects in the pier of the bridge, it having been completed under the direct supervision of the plaintiffs' agent and according to his directions, it was adopted by him as sufficient, and that adoption was directly within the range of his agency as the superintendent of the construction of the bridge, and that it was the duty of the plaintiffs if the pier was not satisfactory, either to have insisted upon an alteration of it or to have pointed out its defects to the defendant below, and that having through their agents accepted it as sufficient and acted upon that acceptance, at a time when if any defect in the pier existed it could have been remedied at the most trivial expense, it does not now lie in their mouth to make an objection which they clearly waived and took the risk of at the time. The defect, if it really existed, was a variation from a level, and being such, was patent to them in the inception and at every stage of the construction. The Court will observe that there is no allegation in the evidence or in the judge's charge that the defect of level arose, after the construction began, out of any latent defect in the foundations of the pier and such as were not originally discoverable. If it had developed after the bridge was completed, possibly the charge of the judge, had it been qualified to meet that state of case, might have been nearer to the true rule but even then, and certainly in absence of any proof to that point, the charge is erroneous. See Jones vs. Dermot, 2 Wallace p. 7, and the New Jersey case in the Court's opinion.

5th Point. The plaintiffs in error will maintain that the Court's charge, as specified under the fifth assignment of error is at war with the well-settled rule both of law and equity; which rule is this: that any admission of a party to the cause offered

in evidence by the adversary, whether in the form of an account containing debits and credits, or in an affidavit, answer, deposition, pleading or other document, while the whole admission is made evidence, and is to be considered by the jury, no part of it is conclusive upon the party offering the admission; but any portion of it may be assailed by the party offering and relying upon another part of it, and when assailed the jury are at at liberty to accept one part as true and reject the other portion as false. "The jury need not give equal credit to any part and will frequently lend an *academic faith* to such portions as make in favor of the declarant."

See Act Congress, 13 Statutes at Large, p. 351.
Perkins vs. Hart, 11 Wheaton, 256.
Rose vs Sarary, 2 Bing. N. C. 145; 2 Scott, 199 S. C.
Morehouse vs. Newton, 3 De Gex and Smale, p 307.
Taylor on Evidence, Sec. 655, 656, 657.
1st Greenleaf's Evidence, Sec. 201 and Note 1 and Sec. 218.
Allender vs Vestry of Trinity Church, 3 Gill at p. 173.

The rule then being that any part of an admission may be contradicted by the party offering it, this portion of the judge's charge was erroneous, as was also his ruling to same effect upon the admission of evidence offered in the bill of exceptions which is the subject of 6th Assignment of Error. And if we are right in this, the objection we urge applies with increased force to the last clause in the portion of the charge excepted to, which affirms the conclusiveness by way of estoppel, not only of the items of debit and credit in the account, but of the deduced collateral fact called by the judge the "*corollary*" of the account, that the contract had been fully performed in all its parts by the plaintiffs below.

6th Point. The erroneous exclusion of the offered evidence set out in the bill of exceptions p. 13. This is covered by the objections taken and the authorities cited under the 5th Point.

Upon the whole case it is submitted that the judgment below should be reversed and a new trial ordered.

WM. M. MERRICK,
For Plaintiff in Error.

THE FLORIDA RAILROAD COMPANY

vs.

SMITH AND LATROBE.

In Error to the Circuit Court of the United States for the Northern District of Florida.

BRIEF OF DEFENDANTS IN ERROR.

THE FLORIDA RAILROAD COMPANY

vs.

SMITH AND LATROBE.

In Error to the Circuit Court of the United States for the Northern District of Florida.

BRIEF OF DEFENDANTS IN ERROR.

On the 21st November, 1866, Smith and Latrobe, the Defendants in Error, agreed with the Florida Railroad Company to build a swinging drawbridge at the Amelia Crossing, in accordance with certain plans and tracings.

It was to be of the Fink Suspension pattern,—all iron, except the chords,—to have a specified strength, and to be handed over to the Railroad Company, ready for spiking down the rails, on or before the 1st February, 1867.

The consideration agreed on was $4,360, to be paid cash, on the completion of the work according to the specifications.

The pier, on which the bridge was to swing, was to be built by the Plaintiffs in Error.

It may be stated, in explanation of matter appearing in the record, that the bridge, when completed and ready for spiking down the rails, consisted of two parallel trusses, supporting floor beams, which, in their turn, supported the stringers, to which the rails were "spiked down." Whether the floor beams were to be of wood or iron was one of the matters in dispute in the Court below.

The Plaintiffs in Error failing to complete the pier in season to enable the contractors to finish their part of the work by the time stipulated in the contract, the same was not finished until the summer of 1867, when it was taken into use by the Company, and has continued in use to this date.

There were difficulties in connection with the draw, alleged by the contractors to be due to the imperfect construction of the pier, which were not finally removed until September, 1869.

The Plaintiffs in Error refusing to pay, suit was brought for the contract price, less a credit on account, and for extra work, on the 5th September, 1870,—and the case came up for trial at April Term, 1872, after the bridge had been in use for nearly five years. Testimony on both sides was taken; the Judge charged at length, and a verdict was rendered for the plaintiffs for $4,014 95.

The declaration contained a count on the special contract and the common money counts.

The Plaintiffs in Error pleaded defective workmanship, causing large expenditures on their part,—that they had been obliged to pay damages to a vessel detained by the defective draw,—and that certain payments on account had not been credited;—items amounting in the aggregate to more than the contractors' whole claim.

It will be seen from the evidence, oral and in writing, that the whole difficulty between the parties has arisen, not, in fact, from the workmanship or materials of *the bridge*, but from the difficulty of *working the draw*,—and that this, in its turn, has arisen from the imperfect construction of the pier, which it was the duty of the Company to build.

If this imperfect construction of the pier is properly chargeable to the Plaintiffs in Error, it follows, as a matter of course, that there can be no recoupment for damages of any description, consequent upon the bad working of the draw.

This then brings us to what were, after all, the most important questions in the Court below.

1. Was the defective working of the draw due to the pier or to the bridge?

2. If it was due to the pier, were the Defendants in Error responsible in any way for its defective construction?

On these points, the charge of the Judge below is unexceptionable. It is as follows:

"If the jury find from the evidence, that the difficulty of turning the bridge was from the defect of the pier, and not in the bridge, then the fault would be in the Defendants (below,) whose duty it was to put the pier in proper order to receive the bridge."

To what then was the defective turning owing?

The contemporaneous correspondence furnishes the most reliable proof.

The bridge was ready for use in the Summer of 1867, *Record, p.* 11. On the 7th September, 1867, one of the Defendants in Error writes from Baltimore—that they have "sent an engineer to state what is the matter *with the draw.*" On the 6th June, 1868, he writes to the President of the Company, p. 17, attributing the defect to a want of *level in the track*—and explains the consequences. On the 24th August, 1868, he writes that "he had the necessary *bridled gearing* for the draw-bridge, and asks to have it put on at once and the *cogged ends* set aright," terms relating to the *turning* of the bridge; and on the 22nd September, 1868, he writes again, sending another *set of gearing*, and regretting that the engineers of the Plaintiffs in Error had not been permitted to insert it.

Had there been any complaints with regard to the construction of the bridge, there would certainly have been some notice of it in this correspondence.

Turning now to the testimony contained in the first bill of exceptions—we find, p. 16, that the Railroad Company had laid the granite coping (of the piers) so badly and unevenly, that the traverse circle, while resting on one side, had to be raised on the granite on the other side about one inch, and was sustained by a bed of sulphur, which was a hindrance to the proper setting of the traverse circle." It also appears that the Defendants in Error made every effort to obviate the difficulties attending the draw, and that, in September, 1869, the running-gear was put in order, so that one man readily opened and closed the draw with the crab.

On the part of the Plaintiffs in Error, evidence was introduced to shew, p. 11, that the *draw* was defective and worked with difficulty, and that the Defendants in Error were frequently notified of these defects by letters; (introduced in evidence;) that they made efforts from time to time to remedy the defect until September, 1869. The builder of the pier, examined for the

Plaintiffs in Error, testified that the pier was level, and the admissions of Cooper, an engineer of the Defendants in Error, were given in evidence by the President of the Company, that the pier was level—Moody, another witness of Plaintiffs in Error, testified that he applied an instrument to the pier in 1869 and found it level—and Maeder is referred to as showing while he was connected with the road, that the pier had not settled.

The evidence, on both sides, is referred to as shewing that the difficulty was owing to a defect in the pier. In the language of one of the witnesses, p. 10, "the primary cause of the disarrangement, was the want of level of the masonry work and granite coping built by the Florida Railroad Company." It was to this point the testimony on both sides was addressed. It was a pure question of fact—referred to the jury by the Judge's charge, *and the finding of the jury as to the fact is conclusive.*

Nor was any testimony for the Plaintiffs in Error bearing on this point rejected.

The 8th, 9th, 10th and 11th questions to Maeder, p. 12, which were excluded, had no bearing on the defective construction of the bridge, but only upon the consequences of it; and the finding of the jury made the consequences wholly unimportant, so far as the Defendants in Error were concerned.

The second exception enumerates offers of testimony on the part of the Plaintiff in Error, which the Court rejected. Not a particle of this related to the cause of the defective working of the draw, and the whole of it might have been admitted without affecting the question submitted to the jury.

The bridge was built according to a plan and tracings signed by the parties, and there is no evidence that the plan was departed from. Referring to the exception, p. 12, one offer was to prove that the turning gear was so defective that it took eight or ten men to swing the bridge. The next offer related to the opinion of experts on the same point, with regard to the force required in ordinary cases. The next to the understanding as a rule, that good workmanship and materials are implied; and the last that the quality of the materials, both wood and iron, were bad, matters all of which were immaterial if the fault was owing to defective construction of the pier. Had the whole of the testimony been admitted, it would not have affected the verdict.

The rejection of testimony, which, if introduced, could not affect the verdict, is no ground for reversal, even if the Court below erred in rejecting it.

The Judge's charge being unexceptionable, and his rulings having excluded no testimony properly admissible, we assume as a fact, established beyond controversy, *that the defect in the turning of the bridge was due to the defect in the pier.*

But, say the Plaintiffs in Error, even admitting this, it was the duty of the Defendants in Error, or at least, it was one that they assumed, to see that the pier was level before they placed their work upon it; and they refer to the testimony that Grant, the agent of the Defendants in Error, superintended the laying of the coping.

Now, Grant's whole duty, so far as the Defendants in Error were connected with him, was to put up the work sent by them to Florida. His name appears but once in the Record, p. 11. "The coping was placed on the pier by Courter, who built it under the supervision of Grant, the Plaintiffs' engineer, who superintended the building of the bridge to this extent, directing the edge of the coping to extend over the edge of the pier, which was offered as a suggestion from Grant."

The most that this testimony shows that Grant did, was to offer a suggestion in regard to the setting of the coping so as to protect the pier.

But, suppose that Grant did more, and superintended the work, without authority from the Defendants in Error; his act cannot affect them, and there is no evidence that he had any such authority.

On this point the Court ruled as follows:

"But it is argued that Grant, the agent of the Plaintiffs (below) for the building of the bridge, superintended and directed the laying of the granite coping of the pier, and that, therefore, if it was defectively done, the Plaintiffs were responsible. That might be true," continues the Judge, "if it were shown that Grant, in so doing, was acting within the scope of his authority as agent for the Plaintiffs. But, unless the jury find from the evidence, that Grant was authorized by the Plaintiffs to finish the pier, as well as to build the bridge, any direction of his to the

builder of the pier cannot affect the rights of the Plaintiffs, or bind them in any degree; there is no evidence that he had any authority from the Plaintiffs to do anything but build the bridge."

Further argument, or the production of authority in regard to the relations of principal and agent are not necessary on this point.

We take it, then, that the verdict establishes the two propositions. First, that the defective working of the draw was owing to the defective construction of the pier, which the Plaintiffs in Error had undertaken to build—and, second, that for this defective construction, the Defendants in Error were in no wise responsible.

The 2nd assignment of error of the Plaintiffs in Error, is the ruling out of the testimony offered in the 2nd bill of exceptions, touching the character and quality of the workmanship and materials.

So far as this relates to the working of the draw, it has already been commented on. So far as it relates to the quality of the material, both wood and iron, the best answer to be given is to be found in the Judge's charge, p. 19:

"If the jury find," says the Judge, "from the evidence, that on or about the 1st of July, 1867, the Defendant, (the Plaintiffs in Error), took the bridge into possession, occupied and used the same, and then, or soon afterwards, paid to the Plaintiffs a part of the contract price for the work, without any objection as to the manner of the performance, such facts are evidence of a sanction and acceptance of the work" Referring then to the objection, that the floor beams were of wood, and not of iron—the Judge continues—"that even if the jury shall find that the Plaintiffs did agree to furnish the iron for the floor beams and stringers, and that they substituted wood for iron, and that the Defendants made no objection to the bridge on this account, but took it into possession, and used it for nearly five years before making any complaint on that ground, and then not until after suit brought for the money of the contract price, and the trial had commenced, the presumption is, that the wood was substituted by the consent of the Defendants, or that it was never intended by the parties that the Plaintiffs should furnish iron for these parts of the bridge." &c., &c.

What the Judge says with regard to the floor beams and stringers, is equally applicable to the other parts of the bridge—

all open, from the character of the structure, to the most casual observation.

Now, while it may be admitted, there are circumstances attending the taking possession of a house or a bridge which leave open the question of the way in which the contract for one or the other was executed, yet, in such cases, a payment on account is usually accompanied with a declaration that it is not to prejudice future complaints; or else complaints are made at the time, operating as notice to the contractors that they may be renewed afterwards: but, here, no protest accompanied the payment after the work was done, or any complaint as to the manner of its execution when it was taken possession of. The only complaint made, at any time prior to the trial was with regard to the draw, and this has already been disposed of.

The 3rd and 4th assignments of error are thus answered.

The 5th and 6th assignments of errors relate to the account of the Defendants in Error.

The charge of the Judge which is the subject of the 8th bill of exceptions, and is referred to in the fifth assignment of error, is, not that the Defendants in Error, having offered the account of the Plaintiffs below in evidence, may not contradict any one item of it—but that as the payment which the Defendants (below) relied upon it to prove, was one that could only be claimed after the work was done; and was, in fact, made after the Defendants below had taken possession of it; the fair inference was, that the Defendants in making the payment had admitted "that the contract had been performed, and the Plaintiffs (below) were therefore entitled to recover the contract price."

Had such a payment been accompanied by a protest, or an objection to the manner in which the work was done, it would be otherwise; but in the absence of everything of the sort, a payment on account of a debt payable by contract only when the work contracted for is finished, furnishes a fair ground of inference that all the conditions of the contract have been complied with.

The remaining assignment of error points to a single item in the account, $399 99 for freight on granite coping sent out by the Plaintiffs. This the Defendants below offered to prove was "extortionate and fraudulent," and this offer was refused by the Court.

Touching this, the Record, p. 10, shews that "the Plaintiffs furnished, for the accommodation of the Florida Railroad Company, at the request of E. R. Dickenson, president, in the spring of 1869, the granite coping for the draw-bridge; it was furnished in Baltimore, after their drawings, and was carefully framed together before shipment, and loaded on the same vessel with the iron work purchased by Plaintiffs for the bridge, and forwarded together to Florida."

Now, in the first place, this item formed no part of the contract. At the request of the President of the Company, the Defendants in Error did a part of the Company's work, made the drawings and made ready the coping. It was then to be shipped to Florida, and the freight was paid for it by the Defendants in Error. This is now charged by the Plaintiffs in Error to have been fraudulent and extortionate.

The Defendants in Error, in this connection, were the agents of the Plaintiffs in Error, doing their work and contracting for the freight of their property as their agents. It is submitted that the payment having been made, whether it was too much or too little is not, in this case, open to enquiry.

The only question, under the circumstances, would be whether the agent in carrying out his instructions to procure freight for the Company had acted in good faith. If he has done so, and there is here no pretense to the contrary, it does not lie in the mouth of the principal to repudiate his act.

Whether the reason given in the exception for excluding the testimony is correct, or not, makes no difference. The fact that the money was paid is not disputed—that the vessel in which the transportation took place was the property of the Defendants in Error, is not pretended. The value of the coping, $800, appears in the record; and when its object is considered in connection with its price, its bulk may be appreciated; and it is submitted, that, under all the circumstances, the 6th assignment of error, or the 4th Bill of Exceptions, furnishes no reason to send the case back under a *venire de novo*, the result of which, at the best, would be but to strike, even if the Plaintiffs in Error could prove the charge to be exorbitant, some small sum from an amount in itself less than one-tenth of the verdict.

JNO. H. B. LATROBE,
For Defendants in Error.